Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-28-1995
GOPAL SRI RAM, NH CHAN JJCA, AND AHMAD FAIRUZ J
22 JANUARY 1996

Civil Procedure *— Appeal — Issue not raised in High Court — General rule — Issue could not be argued in Court of Appeal — Whether any exception to general rule — Whether depended on justice of case*

Administrative Law *— Rights and liabilities of public servants — Dismissal of public servant — Public servant convicted of criminal breach of trust in sessions court — High Court affirmed finding of guilt — But conviction and punishment were set aside — Binding over order made — Whether criminal charge had been proved against him — Whether public servant entitled to opportunity to be heard by authority — Whether punishment of dismissal harsh and unjust — Whether authority had acted arbitrarily — Federal Constitution arts 5(1), 8(1), 135(2) & (2)(a) — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 General Orders 33 & 35(1)*

Administrative Law *— Dismissal from service — Dismissal of public servant whom criminal charge had been proved — Doctrine of procedural fairness — Duty of relevant disciplinary authority — Whether should take into account all circumstances of case — Whether need to afford public servant opportunity to be heard — Federal Constitution arts 5(1), 8(1), 135(2) & (2)(a)*

Administrative Law *— Rules of natural justice — Breach of — Dismissal of public servant whom criminal charge had been proved — Not given opportunity to be heard by relevant disciplinary authority upon issue of punishment — Whether breach of natural justice — Whether right of hearing afforded by art 135(2) was lost — Federal Constitution arts 5(1), 8(1), 135(2) & (2)(a)*

Public Servants *— Dismissal — Binding over order made in criminal proceedings — Whether public servant could be subject to disciplinary punishment of either dismissal or reduction in rank without right of hearing — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 General Orders 33 & 35(1) — Federal Constitution arts 5(1), 8(1), 135(2) & (2)(a)*

The appellant, who was a senior assistant of a primary school in Johor, was entrusted by the Johor Education Department ('the department') with a sum of RM 3,179 which constituted the unpaid salary of the school's gardener who had not turned up for work for several months. When the department asked for the return of the money, the appellant told them that it had been sent to them. He had in fact kept it with him. However, he did send the money to the department eventually.The appellant was then charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code (FMS Cap 45) ('the Penal Code'). The sessions court convicted the appellant and sentenced him to six months' imprisonment. On appeal, the Muar High Court affirmed the finding of guilt. However, it made an order which had the effect of setting

aside the conviction and punishment: it bound the appellant over to be of good behaviour for a period of three years in the sum of RM 5,000 without sureties under s 173A(ii)(b) of the Criminal Procedure Code (FMS Cap 6) ('the Code'). Thereafter, the department wrote to the Education Service Commission ('the first respondent'), recommending that the appellant be reduced in rank and salary to those of an ordinary teacher. The first respondent, however, decided to dismiss the appellant under General Orders 33 and 35(1) of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('the 1980 GO'). Dissatisfied, the appellant instituted proceedings in the Johor Bahru High Court, and seeked declarations that his dismissal was null and void and that he was still a member of the education service, on the grounds, inter alia, that: (i) there was no ground for his dismissal under the General Orders since he had not been convicted of a criminal offence; and (ii) the first respondent was in breach of the rules of natural justice for not affording the appellant a reasonable opportunity of being heard pursuant to art 135(2) of the Federal Constitution ('the Constitution'); and (iii) the decision of the first respondent was harsh and unfair having regard to all circumstances of the case. The respondents argued that the appellant was not entitled to the hearing under proviso (a) of art 135(2), as he was a person who was dismissed 'on the ground of conduct in respect of which a criminal charge has been proved against him'. The Johor Bahru High Court upheld the dismissal. The appellant appealed to the Court of Appeal.

Held by a majority of 2:1, allowing the appeal in part (NH Chan JCA dissenting):

(1) (Per **Gopal Sri Ram JCA**) The appellant's counsel's submission that the decision of the first respondent was harsh and unfair was not raised in the court below. Ordinarily, this court would not permit an appellant to argue a point taken in this fashion. However, the category of cases in which a fresh point may be permitted to be argued is not closed: it depends upon where the justice of a case lies. Having considered all the relevant material, it was concluded that the point raised ought to be considered in the interests of justice. No objection was taken by senior federal counsel at the hearing, and no new evidential point was involved (see pp 277I and 278A–D); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 followed.

(2) (Per **Gopal Sri Ram JCA**) The word appearing in para (a) in the proviso to art 135(2) of the Constitution is 'proved' and not 'convicted'. In a case where a binding over order is made under s 173A of the Code, there must first be a plea or a finding of guilt which will result in the offence being proved

A within the terms of para (a) of the proviso to art 135 (2) of the Constitution. In this case, the Muar High Court did uphold the finding of guilt. Accordingly, the protection afforded by art 135 was withdrawn. The Johor Bahru High Court was correct in holding that the appellant was not entitled to a hearing before his dismissal (see p 292B–D).

B

(3) (Per **Gopal Sri Ram JCA**) A member of the public service who has been bound over under s 173A of the Code may be subject to disciplinary punishment of either dismissal or reduction in rank under General Orders 33 and 35 of GO 1980 (see p 293E).

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(4) (Per **Gopal Sri Ram JCA**) A public servant against whom a criminal charge has been proved, may or may not be dismissed solely in reliance on that ground, depending on the particular facts of each case. The relevant disciplinary authority must peruse the record of the criminal proceedings, take into account all the relevant circumstances of the case, including any departmental report or recommendation. If it decides the public servant has committed misconduct, then it must go on to decide which of the several punishments prescribed by General Order 36 it ought to impose (see p 298A–C).

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(5) (Per **Gopal Sri Ram JCA**) In undertaking the above two separate and distinct tasks, the relevant disciplinary authority need not afford the public servant an opportunity to be heard because that right is lost by the operation of para (a) of the proviso to art 135(2) of the Constitution (see p 298D).

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(6) (Per **Gopal Sri Ram JCA**) The doctrine of procedural fairness, which is the product of the combined effect of arts 8 (1) and 5 (1) of the Constitution, does not require that a public servant be given the right to make representations upon the issue of punishment in a case to which proviso of art 135(2) applies (see p 298F).

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(7) (Per **Gopal Sri Ram JCA**) Nevertheless, the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably and fairly. If it acts arbitrarily or unfairly or imposes a punishment that is disporportionate to the misconduct, then its decision is liable to be quashed or set aside (see p 298E).

H

(8) (Per **Gopal Sri Ram JCA**)The first respondent ought to have considered the several factors set out by the Muar High Court and the recommendation of the department. Taking into account all the relevant factors of the case, the order of dismissal was too severe a punishment to impose on the appellant (see p 300D).

I

(9) (Per **Gopal Sri Ram JCA**) The appellant has also prayed for 'further or other relief as this Honourable court thinks fit' in his statement of claim. As such, this court should award the appellant such relief as was appropriate in the circumstances of the case. There was no inconsistency between the relief this court propose to award to the appellant and the other relief he has expressly claimed in the present case (see pp 300I and 301); *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, *Cargill v Bower* (1878) 10 Ch D 502 and *Mokhtar v Arumugam* [1959] MLJ 232 followed.

(10) (Per **Gopal Sri Ram JCA**) Having regard to all the circumstances of the case, the appellant ought not to have the declarations and these are accordingly refused. Instead, an order was made reducing the appellant in rank in the manner appearing in the department's letter dated 10 April 1990, with effect from the date of his dismissal. All arrears of salary and other emoluments accruing to the reduced rank from that date until to-day were to be paid to the appellant (see p 302G).

(11) (Per **NH Chan JCA**, dissenting) In the present case, proviso (a) of art 135(2) applied to the appellant, as he was dismissed 'on the ground of conduct in respect of which a criminal charge [had] been proved against him.' Therefore, the appellant's claim that his dismissal had infringed natural justice in that he was not afforded an opportunity to be heard must necessarily fail (see p 305F).

(12) (Per **NH Chan JCA**) The appellant's case for judicial review, according to his statement of claim, was based on art 135(2) of the Constitution only. It was not founded on the basis that the the penalty of dismissal was unwarranted in the present case and that a lesser penalty should have been imposed on him. That ground was never raised in his pleadings nor did he do so at the trial (see p 305H).

(13) (Per **NH Chan JCA**) The correct test was to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned (see pp 306–307); *Watling & Co Ltd v Richardson* [1978] ICR 1049, *Rolls-Royce Ltd v Walpole* [1980] IRLR 343, *British Leyland UK Ltd v Swift* [1981] IRLR 91 and *Iceland Frozen Foods v Jones* [1983] ICR 17 followed.

A (14) It was reasonable for the employers in the instant case to have reasonably taken the view that dismissal was the appropriate penalty. The offence for which the appellant had been found guilty of was a grave one for which a reasonable employer might reasonably take the view that that in itself was gross misconduct and that it was quite reasonable to dismiss him (see p 308D).

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Per curiam:

(1) (Per **Gopal Sri Ram JCA**) When the constitutionality of State action is called into question on the ground that it infringes a fundamental right, the test to be applied is whether that action directly affects the fundamental rights guarantee by the Constitution or that its inevitable consequence on the fundamental rights is such that it makes their exercise ineffective (see p 283B); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 followed.

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(2) (Per **Gopal Sri Ram JCA**) The requirement of fairness which is the essence of art 8(1), when read together with art 5(1) of the Constitution, goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case (see p 290A).

E

[Bahasa Malaysia summary

Perayu, yang merupakan seorang penolong kanan di sebuah sekolah rendah di Johor, telah diamanahkan oleh Jabatan Pendidikan Johor ('jabatan tersebut') dengan jumlah RM3,179 yang merupakan gaji yang belum dibayar kepada pekebun sekolah yang sudah tidak berkerja untuk beberapa bulan. Apabila jabatan tersebut meminta supaya wang tersebut dipulangkan, perayu memberitahunya bahawa ia telah dikirim kepada mereka. Sesungguhnya, perayu telah menyipan wang tersebut. Walau bagaimanapun, perayu telah mengirim wang tersebut kepada jabatan tersebut akhirnya. Perayu telah dituduh atas dua tuduhan pecah amanah jenayah oleh seorang pegawai awam di bawah s 409 Kanun Keseksaan (NMB Bab 45) ('Kanun Keseksaan'). Mahkamah sesyen telah menyabitkan perayu dan menjatuhkan hukuman penjara selama enam bulan ke atasnya. Atas rayuan, Mahkamah Tinggi Muar telah mengesahkan keputusan mahkamah sesyen bahawa perayu bersalah. Walau bagaimanapun, ia telah membuat suatu perintah yang berkesan mengenepikan sabitan dan hukuman: perayu terikat jamin supaya berkelakuan baik selama tiga tahun untuk jumlah RM5,000 tanpa penjamin di bawah s 173A(ii)(b) Kanun Acara Jenayah (NMB Bab 6) ('Kanun tersebut'). Selepas itu, jabatan tersebut telah menulis kepada Suruhanjaya Perkhidmatan Pendidikan ('penentang pertama'), dan ia mengesyorkan bahawa

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perayu diturun pangkat dan dikurangkan gaji kepada takat seorang guru biasa. Penentang pertama, walau bagaimanapun, membuat keputusan untuk memecat plaintif, di bawah perintah am 33 dan 35 (1) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D' 1980) ('PA 1980'). Perayu, tidak berpuas hati dengan pemecatan itu, memulakan tindakan di Mahkamah Tinggi Johor, dan dia memohon untuk deklarasi bahawa pemecatan terhadapnya adalah batal dan tak sah, dan bahawa dia masih merupakan seorang ahli perkhidmatan pendidikan, atas alasan, antara lain, bahawa: (i) pemecatannya tidak beralasan kerana dia tidak disabitkan dengan kesalahan jenayah; (ii) penentang pertama telah memecah rukun keadilan asasi kerana ia tidak memberikan perayu peluang munasabah untuk dibicarakan menurut perkara 135(2) Perlembagaan Persekututan ('Perlembagaan'); dan (iii) keputusan penentang adalah terlalu keras dan tidak adil memandangkan keadaan kes ini. Penentang pula berhujah bahawa perayu tidak berhak untuk dibicarakan di bawah proviso (a) perkara 135(2), kerana dia merupakan seorang yang telah dipecat 'atas alasan kelakuan di mana suatu pertuduhan jenayah telah dibuktikan terhadapnya'. Mahkamah Tinggi Johor Bahru telah mengekalkan pemecatan tersebut. Perayu merayu kepada Mahkamah Rayuan.

Diputuskan oleh majoriti 2:1, membenarkan sebahagian rayuan (NH Chan menentang):

(1) (Oleh **Gopal Sri Ram HMR**) Penghujahan peguam perayu bahawa keputusan penentang pertama adalah terlalu keras dan tidak adil tidak dibangkitkan di mahkamah bawahan. Biasanya, mahkamah ini tidak akan membenarkan seorang perayu untuk menghujahkan suatu perkara secara ini. Walau bagaimanapun, kategori kes di mana suatu perkara baru boleh dibenarkan untuk dihujahkan tidak terhad: ia bergantung kepada keadilan kes. Selepas mempertimbangkan kesemua material yang relevan, adalah diputuskan bahawa perkara yang dibangkitkan tersebut patut dipertimbangkan atas kepentingan keadilan. Peguam negara kanan tidak membangkang semasa pembicaran, dan keterangan yang baru tidak terlibat (lihat ms 277I and 278A–D); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 diikut.

(2) (Oleh **Gopal Sri Ram HMR**) Perkataan yang muncul dalam perenggan (a) proviso perkara 135(2) Perlembagaan ialah 'dibuktikan' dan bukannya 'sabitan'. Dalam suatu kes di mana suatu perintah ikat jamin dibuat di bawah s 173A Kanun tersebut, terlebih dahulu, harus terdapat suatu akuan atau keputusan kebersalahan yang menyebabkan kesalahan dibuktikan dalam terma perenggan (a) perkara 135(2) Perlembagaan. Dalam kes ini, Mahkamah Tinggi Muar telah mengekalkan keputusan kebersalahan. Maka, perlindungan

yang diberikan oleh proviso telah ditarik balik. Mahkamah Tinggi Johor Bahru adalah betul dalam memutuskan bahawa perayu adalah tidak berhak untuk suatu perbicaraan sebelum pemecatannya (lihat ms 292B–D).

(3) (Oleh **Gopal Sri Ram HMR**) Seorang kakitangan perkhidmatan awam yang telah diikat jamin di bawah s 173A Kanun tersebut boleh tertakluk kepada hukuman tatatertib, iaitu sama ada pemecatan atau penurunan pangkat di bawah Perintah Am 33 dan 35 PA 1980 (lihat ms 293E).

(4) (Oleh **Gopal Sri Ram HMR**) Seorang kakitangan perkhidmatan awam yang mana suatu sabitan jenayah telah dibuktikan terhadapnya, boleh dipecat atau tidak dipecat, semata-mata atas alasan itu, bergantung kepada fakta tertentu sesuatu kes. Pihak berkuasa tatatertib yang berkenaan mesti membaca dengan teliti rekod prosiding jenayah, mempertimbangkan kesemua keadaan kes yang relevan, termasuk sebarang laporan dan syor jabatan. Jika ia membuat keputusan bahawa pekerja awam telah salah laku, seterusnya ia harus memutuskan hukuman mana yang diperuntukkan oleh Perintah Am 36 harus dikenakan (lihat ms 298A–C).

(5) (Oleh **Gopal Sri Ram HMR**) Dalam menjalankan kedua-dua tugas di atas yang berasingan, pihak berkuasa tatatertib yang relevan tidak perlu memberikan pekerja awam tersebut peluang untuk dibicarakan kerana hak tersebut telah hilang melalui operasi perenggan (a) proviso perkara 135(2) Perlembagaan (lihat ms 298D).

(6) (Oleh **Gopal Sri Ram HMR**) Doktrin keadilan prosedur, yang merupakan hasil kesan bersama perkara 8(1) and 5(1) Perlembagaan, juga tidak mengkehendaki bahawa seorang kakitangan awam diberi hak untuk membuat representasi tentang isu hukuman dalam kes di mana proviso (a) perkara 135(2) terpakai (lihat ms 298F).

(7) (Oleh **Gopal Sri Ram HMR**) Walau bagaimanapun, pihak berkuasa tatatertib harus, apabila memutuskan apa hukuman yang harus dikenakan ke atas kakitangan awam yang terlibat, telah bertindak secara munasabah dan adil. Jika ia bertindak denan sewenang-wenangnya atau tidak adil atau mengenakan suatu hukuman yang tidak sepadan denga salah laku yang berkenaan, keputusannya akan terpaksa dibatalkan atau diketepikan (lihat ms 298E).

(8) (Oleh **Gopal Sri Ram HMR**) Penentang pertama harus mempertimbangkan faktor-faktor yang telah dibentangkan oleh Mahkamah Tinggi Muar dan syor jabatan. Selepas mengambil kira kesemua faktor yang relevan kes ini, perintah pemecatan merupakan hukuman yang terlalu berat untuk dikenakan ke atas perayu (lihat ms 300D).

(9) (Oleh **Gopal Sri Ram HMR**) Perayu juga telah memohon untuk 'relief lain atau selanjutnya yang mahkamah yang mulia ini anggap sesuai' dalam pernyataan tuntutannya. Oleh itu, mahkamah ini harus mengawardkan relief yang sesuai dalam keadaan kes ini. Relief yang mahkamah ini bercadang untuk award kepada perayu dan relief lain yang dia tuntut secara nyata dalam kes ini adalah konsisten (lihat ms 300I dan 301); *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, *Cargill v Bower* (1878) 10 Ch D 502 dan *Mokhtar v Arumugam* [1959] MLJ 232 diikut.

(10) (Oleh **Gopal Sri Ram HMR**) Setelah mempertimbangkan kesemua keadaan kes, perayu tidak akan diberikan deklarasi yang dipohohnya. Sebaliknya, suatu perintah telah dibuat untuk menurunkan pangkat perayu sepertimana yang dicadangkan dalam surat jabatan yang bertarikh 10 April 1990, berkesan dari tarikh pemecatannya. Kesemua tunggakan gaji dan emolumen lain yang terakru terhadap pangkat yang lebih rendah itu dari tarikh tersebut sehingga kini harus dibayarkan kepada perayu (lihat ms 302G).

(11) (Oleh **NH Chan HMR**, menentang) Dalam kes ini, proviso (a) perkara 135(2) terpakai terhadap perayu, kerana dia telah dipecat 'atas alasan kelakuan di mana suatu pertuduhan jenayah telah dibuktikan terhadapnya.' Maka, tuntutan perayu bahawa pemecatannya telah melanggar keadilan asasi, iaitu dia tidak diberikan suatu peluang untuk dibicarakan, sudah tentu gagal (lihat ms 305F).

(12) (Oleh **NH Chan HMR**) Kes perayu untuk kajian kehakiman, berdasarkan pernyataan tuntutannya adalah berlandaskan perkara 135(2) Perlembagaan sahaja. Ia bukan berdasarkan bahawa penalti pemecatan adalah tidak wajar dalam kes ini dan bahawa suatu penalti yang lebih ringan patut dikenakan. Alasan tersebut tidak pernah dibangkitkan dalam pliding atau perbicaraan (lihat ms 305H).

(13) (Oleh **NH Chan HMR**) Ujian yang betul ialah untuk mempertimbangkan sama ada ia adalah munasabah jika majikan perayu memecatnya atas fakta tersebut. Apabila mempertimbangkan apa yang seorang majikan yang munasabah akan buat, mahkamah (sama ada Mahkamah Tinggi, Mahkamah Rayuan atau, Mahkamah Perusahaan) tidak harus menggantikan pendapatnya mengenai apa yang merupakan penalti yang sesuai dengan pendapat majikan yang berkenaan itu (lihat ms 306–307); *Watling & Co Ltd v Richardson* [1978] ICR 1049, *Rolls-Royce Ltd v Walpole* [1980] IRLR 343, *British Leyland UK Ltd v Swift* [1981] IRLR 91 dan *Iceland Frozen Foods v Jones* [1983] ICR 17 diikut.

(14) (Oleh **NH Chan HMR**) Adalah munasabah bagi majikan dalam kes ini untuk berpendapat bahawa pemecatan itu adalah penalti yang sesuai. Kesalahan yang mana perayu didapati bersalah adalah serius, dan seorang majikan yang munasabah mungkin secara munasabah berpendapat bahawa ia merupakan suatu salah laku yang serius dan adalah agak munasabah untuk memecatnya (lihat ms 308D).

Per curiam:

(1) (Oleh **Gopal Sri Ram HMR**) Apabila terdapat pengataan bahawa sesuatu tindakan negara itu adalah tidak mengikut perlembagaan atas alasan ia telah mencabuli hak asasi, ujian yang harus dipakai ialah sama ada tidakan tersebut telah mempengaruhi secara terus hak asasi yang telah dijamin oleh Perlembagaan atau bahawa kesannya yang tidak boleh dielakkan ke atas hak asasi tersebut adalah sedemikian sehingga ia memyebabkan perlaksanaannya tidak berkesan (lihat ms 283B); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 diikut.

(2) (Oleh **Gopal Sri Ram HMR**) Syarat keadilan yang merupakan inti pati perkara 8(1), apabila dibaca bersama perkara 5(1) Perlembagaan, memastikan supaya bukan sahaja suatu prosedur yang adil digunakan di setiap kes berdasarkan fakta sendiri, tetapi bahawa hukuman yang adil dikenakan berdasarkan fakta kes yang tertentu itu (lihat ms 290A).

Notes

For cases on dismissal of public servants, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1525–1563.

For cases on rights and liabilities of public servants, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 453–501.

For a case on breach of rules of natural justice in the dismissal of public servant, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 477.

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 259–699.

Cases referred to

AG for New South Wales v Brewery Employees Union (1908) 6 CLR 469

B Surinder Singh Kanda v The Government of The Federation of Malaya [1962] MLJ 169

Bandhua Mukti Morcha v Union of India & Ors AIR 1984 SC 802

Bhagat Ram v State of Himachal Pradesh AIR 1983 SC 454

British Leyland UK Ltd v Swift [1981] IRLR 91

Cargill v Bower (1878) 10 Ch D 502

Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act, Re AIR 1939 FC 1

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Datuk Harun bin Hj Idris v PP [1977] 2 MLJ 155
Delhi Transport Corp v DTC Mazdoor Congress & Ors (1991) Suppl SCC 600
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697
Goldberg v Kelly [1970] 397 US 254.
HK (An infant), Re [1967] 2 QB 617
Harakrishna Mahatab v King Emperor AIR 1930 Patna 209
Hinds v R [1976] 2 WLR 366
Iceland Frozen Foods v Jones [1983] ICR 17
James v Commonwealth of Australia [1936] AC 578
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129
Kharak Singh v State of Uttar Pradesh AIR 1963 SC 1295
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719
McInnes v Onslow-Fane [1978] 1 WLR 1520
Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356
Minister of Home Affairs v Fisher [1980] AC 319
Mohamed Adil v PP [1967]1 MLJ 151
Mokhtar v Arumugam [1959] MLJ 232
Munn v Illinois (1877) 94 US 113
NC Watling & Co Ltd v Richardson [1978] ICR 1049
Navaratnam v PP [1973] 1 MLJ 154
Olga Tellis v Bombay Municipal Corp AIR 1986 SC 180
Om Prakash v The Director Postal Services AIR 1973 Punj & Har 1
Ong Ah Chuan v PP [1981] 1 MLJ 64
Pergamon Press Ltd, Re [1971] 1 Ch 388
Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308
Ranjit Thakur v Union of India AIR 1987 SC 2386
Rohana bte Ariffin v Universiti Sains Malaysia [1989] 1 MLJ 487
Rolls-Royce Ltd v Walpole [1980] IRLR 343
S Kulasingham & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204
Sambandam v The General Manager, South Indian Railway (1952) 1 Madras LJ 540
Shankar Dass v Union of India AIR 1985 SC 772
Shri Sitaram Sugar Co Ltd v Union of India & Ors (1990) 3 SCC 223
Smt Maneka Gandhi v Union of India AIR 1978 SC 597
Tan Boon Liat @ Allen & Anor, Re [1977] 2 MLJ 108
Union of India v Parma Nanda AIR 1989 SC 1185
Union of India v Tulsiram Patel AIR 1985 SC 1416
Zainal bin Hashim v Government of Malaysia [1979] 2 MLJ 276

Legislation referred to

Federal Constitution arts 5, 5(1), 8, 8(1), 132(1)(h) 135(2), 135(2)(a), 160(2)
Criminal Procedure Code (FMS Cap 6) ss 173A, 173A(ii), 294
Penal Code (FMS Cap 45) s 409
Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 General Orders 3, 4(2)(d), 23, 27(1), (4), (5), 29, 33, 35(1), 36
Indian Constitution arts 14, 21, 311(2)
Criminal Justice Act 1948 s 3 [UK]
Government of India Act 1935 s 240(3) [Ind]
Penal Code s 409 [Ind]
Powers of Criminal Courts Act 1973 s 7(1) [UK]
Probation of Offenders Act 1958 s 4(1) [Ind]

Appeal from: Code No 22–35–1992 (High Court, Johore Bahru)

CV Das (T Balaskanda with him) *(Zaman & Associates)* for the appellant
Abdul Rashid Daud and Mohd Zawawi Salleh (Senior Federal Counsel) for the respondents

Gopal Sri Ram JCA: The appellant was, until his dismissal, a member of the National Education Service. He was employed as the headmaster of a national type Chinese primary school at Simpang Rengam, in the State of Johor. The facts leading up to, and upon which, his dismissal was based are important. I shall therefore go into them in some detail here.

The appellant was, as I have said, the headmaster of a school. He was, in that capacity entrusted with a sum of RM3,179 belonging to the Johor Education Department ('the department'). This sum constituted the unpaid salary of the school's gardener who had not turned up for work for several months. Under the relevant financial regulations that governed the duties of the appellant, he was obliged to return this sum of money to the department. He failed to do so. When the department asked for the return of the money, he told them that it had been sent to them. That was not correct. He had in fact not sent the money across. But in fairness to him it must be said that he had not used any part of it. He had merely kept it with him. Eventually, he did send the money to the Department. Because he retained the money he was charged for an offence under s 409 of the Penal Code (FMS Cap 45). Two charges were framed against him. The sessions court which tried him on those charges found him guilty, convicted him and imposed a sentence of six months' imprisonment. The appellant appealed. The High Court at Muar which heard the appeal affirmed the finding of guilt. But it made an order which had the effect of setting aside the conviction and punishment. It bound the appellant over to be of good behaviour for a period of three years in the sum of RM5,000

without sureties. The order was made under the provisions of s 173A(ii) of the Criminal Procedure Code (FMS Cap 6) ('the Code') which reads as follows:

> (ii) When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order either —
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> (a) dismissing the charge or complaint after such admonition or caution to the offender as to the Court seems fit; or
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> (b) discharging the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.

The reasons for the decision arrived at by the learned judicial commissioner who heard the appeal are reported in [1990] 2 CLJ 103 at p 104.

This is what he said upon the issue of guilt:

> The explanation of the appellant for retaining the money was that by reason of his transfer he became confused (bingung), worried (runsing) and disappointed and injured in his feelings (kecewa) and also because at one time he wished to return the money but a cheque was mislaid. He said he cashed the two cheques in question in order to make it easier to balance the bank account at the end of the month. He gave no effective explanation for keeping the money so long before returning it to the department. He told a lie when in answer to the department's request for payment he said the money had been sent to them. I consider he was rightly found guilty of the offences charged.

Having regard to the relevant law, I am entirely satisfied that the learned judicial commissioner's decision to uphold the finding of guilt made by the sessions court was correct.

The appellant's case was one of criminal breach of trust by retention. Mere retention may or may not be innocent. But where the factum of retention is accompanied by other facts, such as where the accused tells a lie about the sum retained, then, a court may be well entitled to take that additional fact into consideration when deciding whether the accused had a dishonest intention. The proposition which I have just stated is to be found in the judgment of Fazl Ali J in *Harakrishna Mahatab v King Emperor* AIR 1930 Patna 209, a case which I drew to the attention of counsel for the appellant during his argument. It has been applied several times over by our courts.

In *Mohamed Adil v PP* [1967] 1 MLJ 151 at p 152, Ismail Khan J (later CJ, Borneo) quoted the following passage from the judgment of Fazl Ali J:

A It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intentions or not. As the question of intention is not a matter of direct B proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had *mens rea* for the crime. *So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused.* We should however not lose sight of the C principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention. (Emphasis added).

See also *Navaratnam v PP* [1973] 1 MLJ 154, per Ali FJ.

When he came to the question of sentence, this is what the learned judicial commissioner said at p 104:

D In regard to sentence the appellant joined the government as a teacher as far back as 7 January 1957. He was a teacher at Sekolah Rendah Jenis Kebangsaan (Cina) Kangkar Baru from 1 August 1973 to 29 February 1984. He was born in 1938 and therefore 45 years old at the time of the offence. Except for this episode he would appear to have had an unblemished E record. Holding such a position and having had such a long period of service as a public servant it struck me as being extraordinary and indeed incredible that the appellant should have risked his profession and effectively a life time of service to profit from as little as six and a half thousand dollars. The appellant in retaining the money would appear to have acted out of sheer stubbornness and cussedness. He would appear to have retained it F because he was upset with the department over his transfer and some accusations the department had supposedly made against him. To make things worse his wife was always quarreling with him over his alleged association with a lady teacher. He was confused, at a loss as to what to do. All this I gather from his saying 'Saya jadi bingung'. He was worried, anxious (runsing). He was disappointed and injured in his feelings (kecewa).

G He took the money, not stealthily but openly, in the presence of the clerk in the school office. He did not spend the money but kept it in his house. He eventually returned it to the department in full. Unfortunately he told a lie in answer to the request for payment and kept the money too long. I do not see much criminality in the appellant's action or more appropriately I should say *the offences were committed under extenuating* H *circumstances. It is a borderline case*, one suitable for exercise of the power given under s 173A of the Criminal Procedure Code. (Emphasis added.)

I have dealt with the criminal proceedings against the appellant at some length for two reasons. First, it is important to remember that, at the end of the day, the relationship this court has been called upon to examine is I one of master and servant. Of essence to that relationship is the element of honesty and trustworthiness. Generally speaking, once the honesty of a servant to his master comes under a cloud, the very fabric of that relationship is destroyed and, save in the most exceptional of circumstances, it becomes an impossibility to insist that the relationship continue. In the present case

there is an added factor. The relationship of master and servant subsists in the context of public service. A finding of dishonesty by a court of competent jurisdiction against a public servant, however low or high an office he or she may hold, effectively destroys public confidence in the civil service administration. It may therefore become difficult to continue the relationship of master and servant in those circumstances unless there are very special factors that govern the case.

The second reason has to do with the issue of punishment. The Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('Chapter D'), to which the appellant was subject, does in fact provide for a wide range of punishments, from the most lenient to the most severe. It is an exceptionally well drafted document and, in General Order 36, it provides as follows:

> 36 A Disciplinary Authority may impose on an officer any one or any combination of two or more of the following punishments:
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> (a) warning;
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> (b) reprimand;
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> (c) fine;
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> (d) forfeiture of salary;
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> (e) stoppage of increment;
>
> (f) deferment of increment;
>
> (g) reduction of salary;
>
> (h) reduction in rank;
>
> (i) dismissal.

Now, in varying the sentence from imprisonment to one of binding over under s 173A of the Code, the learned judicial commissioner alluded to certain circumstances which he considered to be of an extenuating nature. His remarks assume importance in the context of whether the respondents to this appeal — the Education Service Commission and the Government of Malaysia — were entitled to summarily dismiss the appellant in reliance of the finding of guilt, or whether they were under an obligation to take into account the particular circumstances of the case and impose a lesser punishment upon him. This question lies at the heart of the second primary submission made by counsel for the appellant to which I shall devote my full attention later.

I now return to the mainstream of the factual background.

Following the decision of the High Court at Muar, the department, on 10 April 1990, wrote to the secretary of the first respondent. It has been reproduced in full by the learned judge in his judgment which is reported in [1995] 2 MLJ 476. So has all the other correspondence that has passed in this case. But the letter of 10 April is an important document, and for that reason I shall reproduce it here in full. Shorn of its formalities, it reads as follows:

> Adalah saya dengan hormatnya merujuk kepada surat tuan bil SPPZ60/1/12–43138/(36) bertarikh 16 Januari 1990 mengenai perkara di atas.

2 Dimaklumkan iaitu dalam perbicaraan kes rayuan oleh Encik Tan Chee Meng @ Tan Tek Seng di Mahkamah Tinggi, Muar pada 1 April 1990 didapati bahawa Mahkamah Tinggi telah memerintah rayuan pegawai tersebut diterima. Hukuman dan sabitan yang dikenakan ke atasnya oleh Mahkamah Sesyen Muar diketepikan dan digantikan beliau dilepaskan dengan bersyarat supaya berkelakuan baik selama tempoh tiga tahun dari tarikh 1 April 1990 di bawah s 173A(ii)(b) Kanun Keseksaan dengan ikatan bon berjumlah RM5,000 tanpa penjamin. Bersama-sama ini disertakan satu salinan fotostat perintah mahkamah daripada Penolong Kanan Pendaftar, Mahkamah Tinggi Muar Criminal Appeal No 52–2–88 bertarikh 3 April 1990 untuk tatapan dan tindakan tuan selanjutnya.

Syor Pengarah Pendidikan Johor

Memandangkan pegawai tersebut telah dilepaskan oleh mahkamah dengan bersyarat supaya berkelakuan baik selama tiga tahun mulai dari 1 April 1990 dan dengan ikatan bon sebanyak RM5,000 tanpa penjamin, jabatan ini berpendapat bahawa pegawai tersebut disifatkan sebagai berkelakuan yang telah menjatuhkan reputasi perkhidmatan awam iaitu bertentangan dengan Perintah Am 4(2)(d) Bab 'D' 1980. Kejujurannya dalam pentadbiran kewangan sekolah adalah diragukan. Pada pandangan jabatan ini beliau tidak lagi sesuai untuk menyandang jawatan kenaikan pangkat sama ada jawatan guru besar atau penolong kanan di sekolah. Oleh kerana beliau adalah seorang pegawai yang telah ditempatkan atas tangga gaji khas untuk penyandang sebagai guru besar sekolah rendah Gred 'B'/penolong kanan sekolah rendah Gred 'A' pegawai perkhidmatan pendidikan kategori C2 tingkatan khas maka jabatan ini mengesyorkan supaya Encik Tan Chee Meng @ Tan Tek Seng diturunkan pangkat dan gajinya dari jawatan penolong kanan sekolah rendah Gred 'A' pegawai perkhidmatan pendidikan kategori C2 tingkatan khas (khas untuk penyandang) ke jawatan guru biasa, pegawai perkhidmatan pendidikan kategori B1 tingkatan biasa.

As may be seen, this letter makes it clear from its contents that the department was recommending that the appellant should continue in service but suffer a reduction in rank. There was no suggestion that he should be dismissed. But the first respondent did not accept that recommendation. That appears clearly from the letter which the first respondent's secretary wrote to the appellant. It is dated 8 May 1990, and contains the following essential paragraphs:

> Saya diarah menyatakan iaitu Suruhanjaya Perkhidmatan Pendidikan selaku pihak berkuasa tatatertib bagi pegawai-pegawai dalam perkhidmatan pendidikan telah menerima laporan dari ketua jabatan tuan bahawa tuan sebagai seorang pegawai yang berjawatan pegawai perkhidmatan pendidikan kategori C2 tingkatan khas (khas untuk penyandang) yang bertugas sebagai penolong kanan di Sekolah Rendah Jenis Kebangsaan (Cina) Tuan Poon Simpang Rengam, Johor telah ditangkap oleh Badan Pencegah Rasuah Johor pada 30 April 1986 dan dihadapkan ke Mahkamah Sesyen Muar, Johor pada 3 Mei 1986 atas tuduhan pecah amanah iaitu kesalahan yang boleh dihukum di bawah s 409 Kanun Keseksaan. Mahkamah Sesyen Muar, Johor pada 2 Julai 1988 telah memutuskan tuan disabitkan bersalah dan dijatuhkan hukuman penjara selama enam bulan.

2 Tuan telah mengemukakan rayuan ke Mahkamah Tinggi Muar, Johor dan mahkamah tersebut pada 1 April 1990 telah mengenepikan hukuman penjara enam bulan yang telah dijatuhkan oleh Mahkamah Sesyen Muar, Johor ke atas tuan dan Mahkamah Tinggi tersebut memutuskan tuan dikenakan ikat jamin berkelakuan baik selama tempoh tiga tahun mulai 1 April 1990 di bawah seksyen 173A(ii)(b) Kanun Keseksaan dengan bon jaminan sebanyak RM5,000 tanpa penjamin. Dengan sabitan tersebut, tuan telah menjatuhkan reputasi perkhidmatan awam iaitu kesalahan di bawah Perintah Am 4(2)(d) Perintah-perintah Am Pegawai Awam (Kelakuan dan Tatatertib)(Bab 'D') 1980.

3 Setelah menimbang laporan di atas dan berdasarkan kepada Perintah Am 33 dan 35(1) Bab 'D' 1980, suruhanjaya ini memutuskan tuan dikenakan hukuman tatatertib buang kerja berkuatkuasa mulai 7 Mei 1990.

Now, it is not disputed; indeed it is common ground; that the appellant was not given an opportunity to be heard before the decision to dismiss him was taken and communicated to him via the letter of 8 May. It is apparent from the contents of this letter that the first respondent treated the order of the Muar High Court as a conviction against the appellant. The expression 'dengan sabitan tersebut' (with the abovementioned conviction) which appears in the latter portion of the second paragraph of the letter is an obvious reference to the order of the High Court binding the appellant over under s 173A of the Code. Further, the letter treats the order of the High Court as having altered only the sentence imposed by the sessions court. This comes across in the phrase 'telah menepikan hukuman' (set aside the sentence) which appears earlier in the same paragraph. The question that arises is whether the first respondent correctly appreciated the effect of the order made by the High Court at Muar. This question is relevant to both the first and second primary submissions of counsel for the appellant. I shall deal with it in due course. But I must first wind up the factual narrative.

The appellant, being dissatisfied with his dismissal, instituted proceedings to challenge it. On 18 February 1992, he caused to be issued a writ and statement of claim in which he sought two declarations. By the first, he asked the court to declare that his dismissal was null and void and of no effect. The second declaration was consequential, in that it asked the court to declare that the appellant was still a member of the public service. The respondents delivered a joint defence, in which they sought to justify the appellant's dismissal on the basis of art 135(2)(a) of the Federal Constitution and General Orders 33 and 35(1) of Chapter D.

The appellant's suit came on for hearing on 8 February 1995. At the commencement of the trial, his counsel (Encik Das' junior before us) informed the court that agreement had been reached between the parties that no evidence would be called by either side, and that the trial would be confined to submissions on the undisputed facts. At the conclusion of argument, the learned judge reserved his decision. In a carefully considered written judgment which he delivered on 31 March 1995, he upheld the appellant's dismissal and dismissed the suit with costs. I think that the

judge should be commended for the speed at which he delivered his judgment and the admirable clarity with which he dealt with the relevant questions of law — questions of law that are not entirely free from difficulty. I shall go into his conclusions upon the points raised before him in some detail when I deal with the submissions advanced on the appellant's behalf. And it is to these I shall now turn.

The submissions of counsel

The first primary submission of counsel for the appellant is comprised in the question which Encik Das formulated when he opened the appeal: can a member of the public service who has been bound over under s 173A of the Code be subject to disciplinary punishment of either dismissal or reduction in rank under General Orders 33 and 35 of Chapter D?

In arguing that the question posed should be answered in the appellant's favour, Encik Das made the following submissions: (1) that the order made by the High Court, Muar whereby his client was bound over under s 173A was not a conviction within the meaning of that term as defined by General Order 3 read with General Order 33 of Chapter D; (2) the second defendant therefore erred in treating it as such in its letter dated 8 May 1990; (3) the learned judge, when he upheld the dismissal, also erred in placing the construction he did on the effect of an order made under s 173A; (4) no doubt, the learned judge's construction of the section was based upon the observations made in the judgment of Viscount Dilhorne in *Zainal bin Hashim v Government of Malaysia* [1979] 2 MLJ 276. But those observations erroneously state the effect of an order made under the section; (5) the appellant was entitled to be heard on the issue of misconduct before a decision was arrived at by the first respondent; (6) the first respondent was therefore not entitled to act automatically and without more upon the binding over order made by the learned judicial commissioner in the Muar High Court and to dismiss the appellant on that basis; (7) by adopting the procedure it did, the first respondent deprived the appellant of the constitutional protection afforded by art 135(2) of the Federal Constitution.

The second primary submission of Encik Das, which raises an issue of constitutional importance, is that the decision of the first respondent is open to challenge on the ground that it is harsh, unfair and unjust having regard to the circumstances of the case. Further, the appellant, at all material times, had a vested right to be heard upon the issue, not only of misconduct, but also upon the nature and extent of the punishment that he ought to receive in the circumstances of this particular case. Since the respondents admittedly did not afford any opportunity to the appellant in that behalf, there had been a failure to observe the requirements of a fair procedure before the decision to dismiss was taken.

Now, I have very carefully perused the record of appeal and find that the point taken in the second primary submission was not raised in the court below. Ordinarily, this court will not permit an appellant to raise and argue a point taken in this fashion. The rule is not merely procedural but

is one of essential justice. However, the category of cases in which a fresh point may be permitted to be argued is not closed: it depends upon where the justice of a case lies: *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719. The question that arises is whether the instant appellant ought to be permitted to argue the point that he has taken in his second primary submission.

I must confess that this question has caused me a great deal of difficulty. But, having considered all the relevant material that is before this court, I have come to the decision that, in the interests of justice, the point raised ought to be considered. In the first place, no objection was taken by senior federal counsel at the hearing of this appeal to the point being argued.

Secondly, I have formed the view that no injustice will be occasioned to the respondents if the point is allowed to be taken because no new evidential material is involved in the issue raised. Further, the point taken concerns the very same constitutional provisions that are germane to the issues that were in fact raised and argued in the court below. I shall therefore proceed to consider and deal with all the submissions directed upon this point before this court.

Article 135(2) and the relevant General Orders

In order to fully appreciate the width of the submissions made by counsel, it is necessary to advert to art 135(2) of the Federal Constitution, in particular to proviso (a) thereof, as well as to some of the relevant General Orders, including the two referred to in the question posed by counsel.

Let me take art 135(2) first. It reads as follows:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this Clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

There are several General Orders which are relevant to the argument of counsel. In the first place, there is the definition of the term 'convicted' appearing in General Order 3 which reads as follows:

> 3 In these General Orders unless the context otherwise requires —
>
> 'convicted' or 'conviction' *includes* a finding or an order involving *a finding of guilt* by a criminal court in Malaysia or elsewhere, or by a competent body conferred with the power to conduct summary investigation under any written law that the person charged or accused has committed an offence; (Emphasis added.)

Then there is General Order 4(2)(d) which is referred to in the Department's letter of 10 April 1990 which is in the following terms:

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4 The following is the code of conduct of officers in the public service. The breach of any of the provision of this code by an officer renders him liable to disciplinary action under these General Orders:

(2) An officer shall not —

(d) conduct himself in such manner as to bring the public service into disrepute or to bring discredit thereto;

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Next, there is General Order 23, which was read to us during argument. It reads as follows:

23 In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has

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been afforded a reasonable opportunity of being heard:

Provided that this General Order shall not apply to the following cases:

(a) Where the Appropriate Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this General Order; or

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(b) Where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this General Order.

Before reproducing the next relevant General Order, I pause to observe that neither proviso to General Order 23 is relevant to the circumstances

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of the present case, nor were they relied upon by the respondents in support of the appellant's dismissal.

I shall now set out General Orders 27(1), (4), (5) and 29 which were read to us during argument. They are as follows:

27(1) Where criminal proceedings are instituted against an officer, the

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Registrar or the Senior Assistant Registrar of the Court in which the said proceedings are instituted, shall send to the Head of Department a report containing the following information —

(a) at the commencement of the said proceedings, the following information —

(i) the charge or charges against the officer;

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(ii) if arrested, the date and time when the officer was arrested;

(iii) whether or not he is on bail; and

(iv) other relevant information; and

(b) at the conclusion of the said proceedings, the judgment of the court.

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(4) Where criminal proceedings against the officer result in his conviction, the Appropriate Disciplinary Authority shall suspend the officer from the exercise of his duties from the date of his conviction pending its decision under General Order 33.

(5) Where criminal proceedings against the officer result in his acquittal

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and no appeal is lodged against the said acquittal by or on behalf of the Public Prosecutor, the officer shall be allowed to resume duty and he

shall be allowed to receive the unpaid portion of his emoluments withheld from him whilst under interdiction. But where an appeal is lodged against the said acquittal, the Appropriate Disciplinary Authority shall decide whether or not the officer should continue to remain under interdiction until the said appeal is finally disposed of.

In this Order, the term 'acquittal' includes a discharge not amounting to acquittal.

29 An officer who is acquitted shall not be dismissed on the charge upon which he is acquitted but nothing in this General Order shall prevent disciplinary action from being taken against the officer on any other grounds arising out of his conduct in the matter whether or not connected with the performance of his duties provided that the said grounds do not raise substantially the same issues as that on which he is acquitted.

There remain two further General Orders which I must quote in full. These are General Orders 33 and 35(1) which were relied upon by the respondents in para 8 of their defence to support the appellant's dismissal. They read as follows:

33 Where criminal proceedings against an officer result in his conviction, or where his appeal against his conviction has been dismissed, the Head of Department concerned shall apply to the Registrar or Senior Assistant Registrar of the relevant Court for a copy of the judgment of the Court. Upon receipt of the said judgment, the Head of Department shall submit the same to the Appropriate Disciplinary Authority together with full particulars of the officer's past record of service and recommendation of the Head of Department as to whether the officer should be dismissed from the service or otherwise dealt with depending on the nature and gravity of the offence committed in relation to the degree of disrepute which it brings to the service.

35(1) Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Order 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly; or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.

I find it convenient to examine the points raised in this appeal under two broad headings: first, the due observation of procedural fairness upon the issue of misconduct; second, the fairness or reasonableness of the punishment imposed. But before I undertake such an examination I think it useful to make some comments of a general nature with regard to the law governing procedural fairness in our jurisdiction.

Procedural fairness: an overview

That a public decision-taker should ensure that procedural fairness is meted out when arriving at his decision is well entrenched in our law. In the early development of this area of jurisprudence, our courts were much influenced by the English common law upon the subject. In particular,

A reliance was placed on what came to be known as the rules of natural justice, comprised in two maxims of ancient origin having their roots in Roman law: *nemo judex in causa sua* (no man shall be a judge in his own cause) and *audi alteram partem* (both sides must be heard, or no man shall be condemned unheard). See, for example, *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] MLJ 169. The common law, however, always recognized that the categories of natural justice were not closed: *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308. The rules expressed in the two Latin maxims adverted to are, therefore, sufficiently flexible to meet new fact patterns that emerge from time to time.

English common law, which lacks the distinct advantage of a supreme law contained in a written constitution, has had to grope about in the dark and unlit passages of constitutional and administrative law, and undergo a rather slow and gradual development. It was only after the decision in *Re HK (An infant)* [1967] 2 QB 617 did it come to recognize that a public decision-taker was under a duty to act fairly and that the duty encompassed, but was wider than, the rules of natural justice. See, for example, *Re Pergamon Press Ltd* [1971] 1 Ch 388 at pp 399–400; *McInnes v Onslow-Fane* [1978] 1 WLR 1520. Eventually, in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock formulated as a separate category, cases of procedural impropriety, an expression which he preferred to the age old rules of natural justice.

A reading of the English cases leaves me with the distinct impression that English judges have slowly but surely made their way in the direction of their American counterparts who, through their pronouncements, based upon the due process clause in the Fourteenth Amendment to their Constitution, have required that there be procedural fairness in the taking of administrative decisions. See, for example, *Goldberg v Kelly* [1970] 397 US 254. This move by English courts to a broader basis of interference has not gone unnoticed by academic writers. See, for example, 'Procedural Fairness: A Study in Crisis in Administrative Theory' by Loughlin in (1978) 28 University of Toronto Law Journal 215 and 'Judicial Review and Procedural Fairness in Administrative Law' 25 McGill Law Journal 520.

The concept of procedural fairness was first introduced into our jurisprudence by the decision of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487. Apart from being a case of general importance in the field of administrative law, it sets out, in particular, a useful summary of the principles, distilled from numerous authorities, upon which our courts will intervene by way of judicial review.

In my judgment, it is wholly unnecessary for our courts to look to the courts of England for any inspiration for the development of our jurisprudence on the subject under consideration. That is not to say that we may not derive useful assistance from their decisions. But we have a dynamic written constitution, and our primary duty is to resolve issues of public law by having resort to its provisions.

The relevant articles of the Federal Constitution in this regard are arts 5(1) and 8(1). Of these, the latter is all pervading in effect. For that reason, I shall reproduce them in the reverse order. They read as follows:

8(1) All persons are equal before the law and entitled to the equal protection of the law.

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

The expression 'law', which appears in both these articles, has been defined by art 160(2) as follows:

> 'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

And the expression 'written law' that appears within the definition above quoted is itself defined by the same article as follows:

> 'Written law' includes this Constitution and the Constitution of any State.

In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206, Hashim Yeop A Sani J (later Chief Justice of Malaya) in a judgment that was upheld by the then Federal Court, applied, in the following passage, the wider interpretation of the expressions such as, 'law', 'in accordance with law' and 'protection of the law' which appear in arts 5 and 8 rendered by Lord Diplock in *Ong Ah Chuan v PP* [1981] 1 MLJ 64 at p 70 when considering the identical provisions in the Constitution of the Republic of Singapore:

> In my view the proper interpretation of the word 'law' is not as in *Comptroller-General of Inland Revenue* v *NP* [1973] 1 MLJ 165 which is with respect, too restrictive, but as interpreted in *Ong Ah Chuan* v *PP* in the judgment of the Privy Council dealing with the very same words 'in accordance with law' appearing in a provision of the Singapore Constitution, where Lord Diplock at p 71 said:
>
> > 'In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.'

A It follows from what was said in *Ong Ah Chuan* that the term 'law' encompasses both substantive law and procedure established under enacted law.

When the constitutionality of State action; be it legislative (which is not the case here) or administrative; is called into question on the ground B that it infringes a fundamental right, the test to be applied is, whether that action directly affects the fundamental rights guaranteed by the Federal Constitution, or that its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory. This was laid down by the Supreme Court in its landmark decision in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 C MLJ 697. I need cite only the following passage (at p 712) from the principal judgment delivered by Abdul Hamid Omar LP in that case:

> In so holding, his Lordship [the reference here is to Dr Anand J in *Mian Bashir Ahmad & Ors v The State* AIR 1982 J & K 26] relied upon the judgment of the Supreme Court of India in *Smt Maneka Gandhi v Union of* D *India* AIR 1978 SC 597 at pp 632–633 where the entire case law on the point was considered, and where their Lordships explained, that the word 'direct' would go to the quality or character of the effect and not the subject matter; and on the other hand, they pointed out:
>
> > 'that the test of "inevitable consequence" helps to quantify the extent of direction necessary to constitute infringement of a fundamental E right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a fortiori it must be presumed to have been affected ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of art 19(1)(a) or (c)'.
>
> F Explaining the expression 'direct and inevitable effect' as used by their Lordships in *Smt Maneka Gandhi*'s case, Dr Anand said (at p 59 para 102 col 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.
>
> He then proceeded to conclude as follows: 'Since the inevitable effect G of s 24-G(a) is that it makes the exercise of right of association guaranteed under art 19(1)(c) ineffective and illusory in so far as legislators are concerned, it must be held to be unconstitutional.'
>
> We share Dr Anand's view taken from the Supreme Court decision in *Smt Maneka Gandhi's* case, that
>
> H > 'in testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'. (Emphasis added.)

I In *Maneka Gandhi v Union of India*, the Supreme Court of India explained the content and reach of art 14 of the Indian Constitution, which is in pari materia with art 8(1) of the Federal Constitution, as follows:

> Now, the question immediately arises as to what is the requirement of art 14: what is the content and reach of the great equalizing principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *EP Royappa v State of Tamil Nadu* (1974) 2 SCR 348: AIR 1974 SC 555, namely, that 'from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and, arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of art 14'. Art 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art 14 like a brooding omnipresence and the procedure contemplated by art 21 must answer the test of reasonableness in order to be in conformity with art 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of art 21 would not be satisfied.

There are four observations that I wish to make upon the foregoing passage.

In the first place, the decision in *Maneka Gandhi* makes a significant departure from the approach previously adopted by the courts of India to the interpretation of art 14. The former approach was based upon the doctrine of reasonable or rational classification. Our courts have hitherto followed Indian authorities and adopted the same approach. See, eg, *Datuk Hj Harun bin Hj Idris v PP* [1977] 2 MLJ 155. The Supreme Court of India, in a series of cases beginning with *Maneka Gandhi v Union of India*, jettisoned the former test, holding that the dynamic concept of equality contained in art 14 should not be confined within 'traditional and doctrinaire limits'.

The effect of all these decisions was summed up by Thommen J in *Shri Sitaram Sugar Co Ltd v Union of India & Ors* (1990) 3 SCC 223 at p 251 as follows:

> Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art 14 of the Constitution. As stated in *EP Royappa* v *State of Tamil Nadu* (1974) 4 SCC3 'equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch'. Unguided and unrestricted power is affected by the vice of discrimination: *Maneka Gandhi* v *Union of India*. The principle of equality enshrined in art 14 must guide every State action, whether it be legislative, executive, or quasi-judicial: *Ramana Dayaram Shetty* v *International Airport Authority of India* (1979) 3 SCC 489, 511-12, *Ajay Hasia* v *Khalid*

A *Mujib Sehravardi* (1981) 1 SCC 722 and *DS Nakara* v *Union of India* (1983) 1 SCC305.

By reason of the decision of our Supreme Court in *Nordin*'s case I do not think it is open to me to ignore the new approach to the construction of art 8(1). Indeed, it would be wrong, both on principle and authority, for B me to stubbornly cling on to an archaic and arcane approach to the construction of art 8(1). I would therefore adopt the test suggested by the Supreme Court of India in *Maneka Gandhi* and apply it to the present case.

The second observation I would make is with regard to the difference C that exists in point of language between art 21 of the Indian Constitution and art 5(1) of the Federal Constitution. The former reads as follows:

> 21 Protection of life and personal liberty
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law.

D In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, Suffian FJ (as he then was) drew attention to the difference in language between the two articles. He said (at p 150 of the report):

> Our law is quite different from that of India ... Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not E as in India where it must be in accordance with procedure established by law. I have underlined the word 'procedure' twice in the extract from Sastri J's minority judgment in *Atma Ram* above [the reference here is to *State of Bombay v Atma Ram* AIR 1951 SC 157], to show the importance attached to procedure under Indian law.

F It must not be forgotten that the views in *Karam Singh* were expressed at a time when the learning upon the interpretation of written constitutions was still at its infancy. The only pronouncement of any significance was that made by Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1, to the following effect:

G > The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: per Lord Wright in *James v Commonwealth of Australia* [1936] AC 578 at p 614. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject matter of the enactment itself; and I respectfully adopt the words of a learned Australian judge:
>
> H Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, — to remember that it is a Constitution, a mechanism under which laws are to be made, and not a I mere Act which declares what the law is to be: *AG for New South Wales v Brewery Employees Union* (1908) 6 CLR 469, per Higgins J at p 611.
>
> Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free

> to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*

A

B

But neither this passage nor the authorities referred to in it appear to have been brought to the attention of the Federal Court in *Karam Singh.* More importantly, the legal profession was yet to receive the benefit of the advice of the Privy Council in such cases as *Minister of Home Affairs v Fisher* [1980] AC 319; *Hinds v R* [1976] 2 WLR 366 and *Ong Ah Chuan v PP* [1981] 1 MLJ 64. The broader and more liberal view that has since prevailed was yet to be accepted in such cases as *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 and *Nordin*'s case. It is noteworthy that in *Nordin*, the first and third of the Privy Council decisions I referred to a moment ago were cited with approval and acted upon.

C

D

In *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 at p 114, Lee Hun Hoe CJ (Borneo) made the following comment upon the observations of Suffian FJ in *Karam Singh*:

> For myself I find it difficult to see how our art 5 could be interpreted to exclude the question of procedure even though there is no mention of procedure. The exclusion of procedure is merely an inference drawn from the remarks of Suffian FJ in *Karam Singh*'s case. He was merely pointing out the difference in the wordings of the Indian Constitution and our Constitution. He did not say that procedure was not part of the law. I am inclined to agree with Encik Karpal Singh's contention that the expression 'in accordance with law' in art 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of art 5.

E

F

In these circumstances, bearing in mind, as I do, the important differences in the language of the two articles — art 5(1) of the Federal Constitution and art 21 of the Indian Constitution — the vital question I have to ask myself is this: Does the difference in language between the two articles create any distinction in principle? I have given much thought to this question and have reached the conclusion that it does not. And I will explain in a moment why this is so.

G

H

As I have earlier said, the expression 'law' which appears in arts 5(1) and 8(1) of the Federal Constitution includes procedural law, and in particular, any procedure prescribed by written law. If a particular procedure prescribed by written law is found to be arbitrary or unfair or the procedure adopted in a given case is held to be unfair, then, generally speaking, it must be struck down as offending art 5(1) read with art 8(1).

I

The third observation I wish to make flows naturally from what I have said in the preceding paragraph. In the context of art 5(1), if an unfair procedure is resorted to in the deprivation of a person's life or liberty, then

A the decision and the procedure are liable to be struck down. For the purposes of the present discussion, it becomes important to ascertain the meaning of the expression 'life' appearing in art 5(1). Little difficulty need be encountered in this respect as there are a number of authorities in which the point has arisen for decision.

B In *Munn v Illinois* (1877) 94 US 113 at p 142 (24 LEd 77 at p 90), Field J, in his dissenting judgment, explained the like term appearing in the due process clause in the Fourteenth Amendment to the Constitution of the United States in the following words:

> Unless I have misread the history of the provision now incorporated into all
> C our State Constitutions, and by the Fifth and Fourteenth Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State or Federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State
> D can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.
>
> No State 'shall deprive any person of life, liberty or property without due process of law,' says the Fourteenth Amendment to the Constitution.
> E *By the term 'life', as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.* (Emphasis added.)

The opinion expressed by Field J in *Munn v Illinois* was adopted by the Supreme Court of India in *Kharak Singh v State of Uttar Pradesh* AIR
F 1963 SC 1295.

In *Bandhua Mukti Morcha v Union of India & Ors* AIR 1984 SC 802 at pp 811–812, Bhagwati J made the following pronouncement when considering the expression 'life' appearing in art 21 of the Indian Constitution:

> G It is the fundamental right of every one in this country, assured under the interpretation given to art 21 by this court in *Frances Mullin*'s case (AIR 1980 SC 849) to live with human dignity, free from exploitation. This right to live with human dignity enshrined in art 21 derives its life breath from the Directive Principles of State Policy and particularly cls (e) and (f) of art 39 and arts 41 and 42 and at the least, therefore, it must include protection of
> H the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State — neither, the central government
> I nor any state government — has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State Policy contained in cls (e) and (f) of art 39, arts 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by

> statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of *the right to live with human dignity enshrined in art 21*, more so in the context of art 256 which provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which are in that State. (Emphasis supplied.)

Now it is true that the Federal Constitution, unlike the Indian Constitution, does not contain any Directive Principles of State Policy. Nevertheless, it is plain from the copious and continuous stream of beneficial legislation that is presented at almost every sitting of Parliament and from the voluminous subsidiary legislation that is promulgated periodically, that the elected government is set on improving the lot of the common man. Almost on a daily basis we see regulations being made to better the living and working conditions of our labour force. There are ceaseless and untiring efforts by the elected government, through its several agencies, to provide basic amenities and to improve the quality of life of the masses. Steps are being constantly taken to guard against any deterioration in the quality of the environment in which the populace live and work. Indeed, it is the declared policy of the government to provide housing, water, electricity and communication systems to the far flung areas of our country. And one can plainly see the ceaseless exertions on the part of the elected government to achieve the targeted policy.

In my judgment, the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning.

Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.

A I pause to mention two other decisions of the Indian Supreme Court which are relevant to the view that I have expressed in the preceding paragraph. The first of these is *Olga Tellis v Bombay Municipal Corp* AIR 1986 SC 180 at p 193, where Chandrachud CJ said:

> For purposes of argument, we will assume the factual correctness of the
> B premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by art 21 [the equivalent of our art 5(1)] is wide and far-reaching. It does not mean merely that life cannot be extinguished
> C or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. *An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life*
> D *would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.* And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. *That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be*
> E *an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.* (Emphasis added.)

The second is *Delhi Transport Corp v DTC Mazdoor Congress & Ors* (1991) Suppl SCC 600 at p 717, Satwant J when delivering the majority judgment of the Supreme Court said:

> F The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined
> G premises and uncertain applications. That will be a mockery of them.

When viewed in the light of the observations made earlier, it is not difficult to appreciate that art 135(2) in fact gives effect to the joint operation of arts 5(1) and 8(1) in the context of the dismissal of public servants. Since there is a specific provision, namely, art 135(2), that houses the doctrine
H of fairness in particular cases, it would, in all those cases, save for very limited purposes, be unnecessary to have resort to the wider and general application of arts 5(1) and 8(1). The residual area in which these two articles may nevertheless operate is consequently confined to two broad categories. In the first category will fall cases in which a determination has
I to be made as to the nature and extent of a fair procedure that is required to be applied to the facts of a particular case. The second category comprises of those cases in which the punishment imposed is found to be

disproportionate to the nature of the misconduct found to have been committed in a given case. Thus, the requirement of fairness which is the essence of art 8(1), when read together with art 5(1), goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.

The fourth and final observation that I would make concerns the reference by Bhagwati J to the concept of equality forming part of the rule of law in a republic. Those words were, no doubt, spoken in the Indian context. But I hasten to add that the equality doctrine housed in art 8(1) is very much part of the rule of law in the system of constitutional monarchy that we practise, so that all that his Lordship said in respect of the doctrine applies with equal force here.

With these matters in mind, I now turn to consider the two broad issues that have presented themselves for determination.

Misconduct and procedural fairness

To recall, the appellant's complaint under this head is that he did not receive procedural fairness from the first respondent because the latter had simply acted upon the binding over order made by the Muar High Court without affording him an opportunity to be heard in his defence. Before I express my views upon the submissions of counsel under this head, I propose to first examine how the learned judge approached the point.

In essence, the learned judge held that the appellant's right under art 135(2) had been lost to him because of the proviso (a) thereto. Having discussed at some length the decision in *Zainal bin Hashim v Government of Malaysia* [1979] 2 MLJ 276 and the advice of Viscount Dilhorne, he went on to say as follows ([1995] 2 MLJ 476 at pp 491–492):

> The use of the words '*on account of his conviction on that charge*' by Viscount Dilhorne to describe the plaintiff/appellant there who was bound over under s 173A(ii)(b) of the CPC [Criminal Procedure Code] was intentional and reflective that before a binding over under that section was imposed the individual must have been found guilty *and convicted thereof*. Likewise, in the instant case, the plaintiff must have been found guilty *and convicted* before he was bound over under s 173A(ii)(b) of the CPC and at this stage of binding over the conviction was not recorded so as, to give the plaintiff the chance to turn over a new leaf. The word 'conviction' is defined in para 3 of the GO [Public Officers (Conduct and Discipline) Chapter 'D' General Orders 1980] restrictively and is confined to a finding of guilt without a conviction being recorded. Thus, as stated earlier before the finding of guilt is arrived at there must first be a finding that the charge has been proved. That finding of guilt under s 409 of the Penal Code was tantamount to the plaintiff conducting 'himself in such manner as to bring the public service into disrepute or to bring discredit thereto' (see para 4(2)(d) of the GO). This must surely be the thinking behind the dismissal of the plaintiff.
>
> It is germane to mention that the words emphasized in para (a) of cl (2) of art 135 of the Federal Constitution and reproduced below:

A '2 No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this Clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct *in respect of which a criminal charge has been proved against him*;'

B are identical to the words as italicized and employed in s 173A(ii) of the CPC which reads as follows, 'When any person is charged before the Court with an offence punishable by such Court, *and the Court finds that the charge is proved ...*', and, consequently, the question of dismissal 'without being given a reasonable opportunity of being heard' does not arise. This is also C the case for the dismissal of the plaintiff in the instant case when the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan, Malaysia resorted to paras 33 and 35 in dismissing him. The italicized words in para (a) of cl (2) of art 135 of the Federal Constitution patently show the attitude of the government through the supreme law of the country to dismiss a member of the public service 'on the ground of conduct in respect of which a criminal D charge has been proved against him.' There appears to be no necessity for the court to record a conviction before the plaintiff can be dismissed 'on the ground of conduct' or by conducting 'himself in such manner as to bring the public service into disrepute or to bring discredit thereto.'

For the reasons adumbrated above, the question posed would be answered in the positive and, consequently, the dismissal of the plaintiff was E perfectly legitimate and effected according to law. (The italics are mine.)

There are, as may be seen, two separate and distinct matters on which the learned judge relied when upholding the appellant's dismissal from service. The first relates to his reliance upon the observation of Viscount Dilhorne in *Zainal*'s case where an order made under s 173A of the Code was F treated by the Privy Council as a conviction. The learned judge, in complete obedience to the doctrine of stare decisis, followed the observations of the Privy Council. However, counsel has, as I have earlier said, submitted that the view expressed by Viscount Dilhorne is wrong in the context of the language of s 173A of the Code which is at variance with the parallel United Kingdom provision under which a conviction has to be mandatorily G entered before a binding over order is made. See s 7(1) of the Powers of Criminal Courts Act 1973, and s 3 of the Criminal Justice Act 1948.

On careful reflection, I must express my agreement with the submission of counsel. A careful reading of the judgment of Viscount Dilhorne (which I do not propose to reproduce here) would seem to H confirm that his Lordship did not address his mind sufficiently or at all to a most vital aspect of s 173A. It appears that he must have been influenced by the wholly dissimilar United Kingdom sections in mind. Indeed, the patent error in his reasoning is revealed when a comparison is made between ss 173A and 294 of the Code. In a case which is dealt with under the latter of these two sections, a binding over order is preceded by the I entry of a conviction against an accused. But in *Zainal*'s case, the plaintiff was dealt with under the former provision and not the latter. Therefore, no conviction had ever been entered against him. I must therefore treat the

observation by Viscount Dilhorne as a misconception of the terms of the statutory provision he was dealing with. It follows that the learned judge, although he was bound to follow what was said by the Privy Council in *Zainal*'s case was wrong in treating the order in the present case as a conviction under the Code.

However, that is not the end of the matter. For there is the second and distinct reason for which the learned judge upheld the appellant's dismissal. It has to do with the word 'proved' appearing in para (a) in the proviso to art 135(2) of the Federal Constitution. The word, it is to be noted, is 'proved' and not 'convicted'. In a case where a binding over order is made under s 173A of the Code, there must first be a plea or a finding of guilt. In his judgment in the Muar High Court, the learned judicial commissioner did in fact uphold the finding of guilt made by the sessions court. It follows that the offence was indeed proved against the appellant within the terms of para (a) of the proviso to art 135(2). Accordingly, the protection afforded by that article is, by the language of the supreme law, withdrawn from the appellant. The learned judge was, therefore, entirely correct when he held that the appellant was not entitled to a hearing before his dismissal on the question of misconduct. In the premises, I have no hesitation in upholding the reasoning of the learned judge on this point, which is distinct and separate from his findings on the earlier issue. A careful reading of his judgment leaves me convinced that his treatment of the binding over order in the present case as a conviction did not solely influence his decision to uphold the dismissal.

In deciding to uphold the learned judge's interpretation of para (a) of the proviso to art 135(2) and the relevant General Orders, I have not overlooked the decision in *Om Prakash v The Director Postal Services* AIR 1973 Punj & Har 1, which was cited by counsel during argument. The headnote to that case reads as follows:

> Departmental proceedings are not taken because the man has been convicted. The proceedings are directed against the original misconduct of the government servant. Only the procedure varies in a case where the necessity of a formal inquiry into the allegations of misconduct is rendered unnecessary on account of such an inquiry having been held by a criminal Court on the basis of a much higher standard of proof requisite for the conviction of an accused. Section 12 [of the Probation of Offenders Act, 1958] does not wash away the misconduct of the government servant. No part of s 12 is intended to exonerate a government servant of his liability to departmental punishment for misconduct.
>
> If an appointing authority holds that a person who has been dealt with under s 4 of the [Probation of Offenders] Act is disqualified from being appointed to a particular service on account of his conviction, such an order is liable to be set aside because of the provisions of s 12. But in absence of any rule to the contrary mere conviction of a government servant by a court does not per se disqualify him from continuing to hold the post.

The obvious answer to the proposition advanced by counsel in reliance of this case lies in the definition of the expression 'conviction' in General

A Order 3 and in the express terms of para (a) to art 135(2) to which reference has already been made. It will be recalled that what General Order 3 requires is a finding of guilt, and it is beyond argument that such a finding was, in fact, made against the appellant.

In *Union of India v Tulsiram Patel* AIR 1985 SC 1416 at p 1445, an B authority cited by counsel for the appellant in support of his second primary submission, Madon J (with whom Chandrachud CJ, Tulzapurkar and Pathak JJ concurred) expressed the applicable principle in the Indian context in these words:

> C The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Art 311(2) is itself confined only to these three penalties. Therefore, before denying a government servant his constitutional right to an inquiry, the first D consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry.

For the reasons given by the learned judge and for those appearing in this E judgment, I would answer the question posed by counsel for the appellant at the commencement of his argument in the affirmative. To reiterate, a member of the public service who has been bound over under s 173A of the Code may be subject to disciplinary punishment of either dismissal or reduction in rank under General Orders 33 and 35 of Chapter D.

F Whether a court may review the punishment imposed in a particular case and whether there is a constitutional guarantee of a right of hearing upon the nature of the punishment that ought to be imposed are matters to which I shall now turn.

G *Punishment and procedural fairness*

To recapitulate, the argument advanced on the appellant's behalf under this head is twofold. First, that the extreme punishment of dismissal imposed by the first respondent may be reviewed by a court. If upon a consideration of the merits of the case, the court comes to the conclusion that the punishment is disproportionate to the misconduct committed or H that it is harsh, unfair or unjust in the circumstances of the case, the court may strike it down and reinstate the appellant. Second, the appellant ought to have been given a reasonable opportunity to be heard on the kind of punishment that ought to be imposed upon him. The admitted failure of the first respondent to provide him that opportunity, the appellant I contends, constitutes the deprivation of procedural fairness.

In support of his argument, counsel has placed reliance on a number of authorities. I think I owe it to the efforts of counsel to discuss each of

these in turn. They are all decisions of the Supreme Court of India and turn upon the application of art 311(2) of the Indian Constitution the material portion of which, before amendments were made to it in 1973 and 1976, read as follows:

> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.
>
> Provided that this clause shall not apply —
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

This article, which resembles our art 135(2), is at variance with the latter in two respects. The first is the use of the added expression 'removed' appearing in the Indian article but which is absent in art 135(2).

Secondly, proviso (a) to the Indian article uses the word 'conviction' while ours uses the expression 'proved'. As the learned judge correctly observed in the passage in his judgment earlier reproduced, in using the word 'proved', para (a) of the proviso to art 135(2) follows closely the wording of s 173A of the Code. No doubt the framers of our Constitution had the provisions of s 173A in mind when they drafted art 135(2). Similarly, the framers of the Indian Constitution must have intended to accommodate the language of the parallel legislative provision when they drafted art 311(2).

At the end of the day, what has to be resolved is the question whether, for the purposes of the argument now advanced, this distinction in language between the Indian Constitution and ours is one with or without a difference. My views upon this question must await the examination of the authorities cited by counsel and it is to these that I now turn.

In *Shankar Dass v Union of India* AIR 1985 SC 772, the appellant was a cash clerk employed by the Delhi milk supply scheme department. In 1962, he was prosecuted for having committed criminal breach of trust of a sum of Rs 500. He repaid that sum and pleaded guilty to a charge under s 409 of the Indian Penal Code which is identical to the like section in our Penal Code. He was convicted but released under s 4(1) of the Probation of Offenders Act 1958. That section reads as follows:

> 4(1) Where any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

When sentencing the appellant, the magistrate remarked upon the unfortunate circumstances which led to the appellant retaining the money in question. The appellant was summarily dismissed from service in consequence of the conviction entered against him. He then brought an action against the Union of India to set aside his dismissal. His suit was dismissed by the trial court whose order was affirmed on appeal. The appellant then appealed to a single judge of the High Court who allowed the appeal. The respondent then appealed to a Division Bench of the High Court against the order of the judge. The Dvision Bench comprising of two judges allowed the appeal and restored the order of the trial court. The appellant then appealed to the Supreme Court which allowed the appeal and directed the reinstatement of the appellant. Chandrachud CJ who delivered the judgment of the court said (at p 774):

> It is to be lamented that despite these observations of the learned magistrate the government chose to dismiss the appellant in a huff without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Cl (a) of the second proviso to Art 311(2) of the Constitution confers on the government the power to dismiss a person from service 'on the ground of conduct which has led to his conviction on a criminal charge'. *But that power like every other power has to be exercised fairly, justly and reasonably.* Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since Cl (a) of the second proviso to art 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical. (Emphasis added.)

The second authority cited by counsel for the appellant is *Union of India v Tulsiram Patel* AIR 1985 SC 1416 to which I have already made reference when rejecting the first primary submission of Encik Das. There are, however, passages in the majority judgment in *Tulsiram Patel*'s case which do appear to support the argument of counsel advanced in support of his second primary submission. At p 1477, I find Madon J saying this:

> Not much remains to be said about cl (a) of the second proviso to art 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in *Challappan*'s case [*TR Challappan v Southern Railway* AIR 1975 SC 2216]. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and

> without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. *Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order.* Thus, in *Shankar Dass v Union of India* (1985) 2 SCC 358 (AIR 1985 SC 772) this court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full backwages. *It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case.* (Emphasis added.)

The third and last case relied on by counsel is *Union of India v Parma Nanda* AIR 1989 SC 1185 at p 1193 where after holding that the High Court had no jurisdiction in a dismissal case to impose any punishment to meet the ends of justice, Jagannatha Shetty J, who delivered the judgment of the court, went on to say as follows:

> We may, however, carve out one exception to this proposition. There may be cases where the penalty is imposed under cl (a) of the second proviso to art 311(2) of the Constitution. Where the person, without enquiry is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court, the Tribunal [the reference here is to the Central Administration Tribunal] may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the Tribunal may step in to render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under cl (a). This power has been conceded to the court in *Union of India v Tulsiram Patel* ...

Apart from the cases cited by counsel for the appellant, there is one other decision from which I think it appropriate to quote.

In *Ranjit Thakur v Union of India* AIR 1987 SC 2386 at p 2393, Venkatachaliah J, when dealing with the appropriateness of the punishment handed down by a court martial, said:

A Judicial review generally speaking, is not directed against a decision, but is directed against the 'decision-making process.' The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. *But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh.* It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive
B evidence of bias. *The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.* Irrationality and perversity are recognized grounds of judicial review. (Emphasis added.)

C So much for the Indian decisions.

It is now appropriate to consider whether the views expressed by Indian judges may be applied by our courts in the light of the difference in the language between the Indian art 311(2) and our art 135(2).

D I have given this matter my most anxious consideration. I have made all due allowance for the different words used in the two provisions — the Indian and the Malaysian. Further, I have, *throughout this judgment*, administered unto myself the warning sounded by Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1, about placing reliance upon cases decided by foreign courts when
E construing provisions in their constitutions. It appears at p 5 of the report of that case, and the passage I have in mind reads as follows:

> The decisions of Canadian and Australian courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this court with attention and respect, as the
> F judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis *the*
> G *decision must depend upon the words of the Constitution which the court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.* (Emphasis added.)

H I have exercised all the caution that the law requires me to exercise. Yet I have come to the conclusion that the difference in language to which I have alluded is not significant for the purposes of interpreting art 135(2) of the Federal Constitution. In my judgment, it is to the substance of the respective constitutional provisions that regard must be had. Looking, as
I I do, at the substance of the respective provisions, I am able to say with confidence that our courts may safely adopt the approach taken by the Indian Supreme Court and mould it to suit our own constitutional provision.

Accordingly, the principle, that is to be distilled from the cases which I have discussed, when applied in the Malaysian context, may be stated thus. A public servant against whom a criminal charge has been *proved,* in the sense that I have described earlier, may or may not be dismissed solely in reliance of that ground. It all depends on the particular facts of each case. The relevant disciplinary authority must call for and peruse the record of the criminal proceedings and take into account all the relevant circumstances of the case, including any departmental report or recommendation. It should then decide whether the public servant in question has committed misconduct. If it decides that he has, then it must go on to decide which of the several punishments prescribed by General Order 36 it ought to impose.

In undertaking these two separate and distinct tasks, it need not afford the public servant an opportunity to be heard: for, as the learned judge in the present case correctly concluded, that right is lost to the servant by the operation of para (a) of the proviso to art 135(2). But it must, when deciding what punishment it ought to impose on the particular public servant, act reasonably and fairly.

If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision, to this extent, becomes liable to be quashed or set aside. As to whether our courts must, in all such cases, direct reinstatement or may grant some other appropriate relief in an action for declaratory relief by, for example, imposing a lesser punishment, is a question that I shall return to later.

It follows from what I have said, that the doctrine of procedural fairness, which is a product of the combined effect of arts 8(1) and 5(1), does not require that a public servant be afforded the right to make representations upon the issue of punishment in a case to which proviso (a) of art 135(2) applies. I therefore unhesitatingly reject the argument of counsel on this point.

In arriving at my conclusion upon this aspect of the case, I have not lost sight of decisions which would appear to support the argument of counsel, although they were not cited during argument. A careful examination of the relevant authorities does not reveal any principle that assists the instant appellant.

In *High Commissioner for India and High Commissioner for Pakistan v Lall* LR 75 IA 225, the Privy Council had to deal with the like issue in the context of s 240(3) of the Government of India Act 1935. That sub-section which dealt with, inter alia, the dismissal of public servants, read as follows:

> (3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:
>
> Provided that this sub-section shall not apply —
>
> (a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;

The respondent, a member of the Indian civil service, had been dismissed on charges, which included an allegation of nepotism, without having been given an opportunity to show cause against the making of the order of dismissal. The Privy Council upheld the decision of the Federal Court striking down the order of dismissal. Lord Thankerton, in the course of delivering the advice of the Board, made the following observation (at p 242 of the report):

> Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an inquiry under r 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry.

In *Sambandam v The General Manager, South Indian Railway* (1952) 1 Madras LJ 540, the appellant was a wireman in the respondent's employment. He was charged for misconduct. The allegation was that he had engaged in subversive activities. However, no criminal proceedings had been brought against him. He was given an opportunity to make representations on the charge of misconduct made against him. After considering the representations made by him, his services were terminated. The appellant challenged the termination. He argued that he was in fact dismissed, and that he had been deprived of a right to make representations on the issue of punishment. The court accepted these arguments and struck down the order of termination by applying the decision in *Lall*'s case, which Venkatarama Ayyar J summarized as follows:

> In other words in a case governed by s 240(3) [the section that was considered by the Judicial Committee in *Lall*'s case] there will be two stages: firstly, an enquiry after notice into the charges against the civil servant and this is the rule of natural justice that no person should be condemned without a hearing and secondly after the enquiry is over and a punishment decided on a further notice in terms of sub-s (3) informing the civil servant of the action proposed to be taken and giving him an opportunity to show cause against that action and this is a statutory requirement.

It is patently clear that neither *Lall* nor *Sambandam* were cases in which there had been no conviction upon a criminal charge. Accordingly, proviso (a) to s 240(3) (in *Lall*'s case) and proviso (a) to art 311(2) (in *Sambandam*'s case) did not come into operation.

In the context of art 135(2), it may well be argued that in cases to which para (a) of the proviso does not apply, a public servant is entitled to a second right of hearing on the issue of punishment. But I abstain from expressing any view upon the matter because it does not arise for consideration in the instant appeal. This court is here concerned with a case to which proviso (a) to art 135(2) does in fact apply. And as I apprehend the law based upon the decision in *Tusiram Patel* there is no second right of hearing upon the issue of punishment in cases falling within proviso (a) to art 135(2).

Severity of punishment

The next question I need to address is whether the order of dismissal made by the first respondent is unduly severe in all the circumstances of the case. In order to answer that question, it is necessary for me to re-examine some of the salient facts.

It will be recalled that the department did not recommend dismissal. It suggested that the appellant be reduced in rank. But the first respondent did not accept that recommendation. It acted purely upon the basis of the binding over order made by the Muar High Court. The first respondent's letter of 8 May 1990, by which it dismissed the appellant does not reveal that it took any other factor into account. This is precisely what the law says should not be done. Of course, the appellant had had a criminal charge proved against him. But all that did, as I have earlier said, was to deprive the appellant of the right of making any representation upon the issue of misconduct and punishment.

In my judgment, the first respondent ought to have considered the several factors set out by the learned judicial commissioner in his judgment and the recommendation made by the Department. Had it done so, it may well have come to the conclusion that dismissal was too severe a punishment to impose upon the appellant and that a lesser punishment ought to be imposed.

Earlier in this judgment, I spoke of exceptional cases of master and servant in the context of the public service. The present appeal is one such case.

In a case like the present, this court is, for the reasons already given, sufficiently empowered to come to its own conclusion on the merits of the case. Taking into account all the relevant facts of the case, including the extenuating factors alluded to by the Muar High Court, I am inclined to agree with the submission of counsel that the order of dismissal was too severe a punishment to impose upon the appellant. In the peculiar circumstances of this case, some lesser punishment ought to have been imposed. Having come to this conclusion, the next question that arises is: what relief ought the appellant to be given?

The appellant has, as earlier observed, claimed declarations. If he is granted these, they would have the effect of reinstating him to his former post with no loss of pay and other benefits. Now, this court may certainly direct reinstatement on such terms. But that, in my view, is not the proper remedy in the peculiar circumstances of this case.

The important question is: Can, and ought this court impose any other appropriate punishment? I think that it can, and that it should.

In arriving at my conclusion on the remedy that ought to be given in this case, I have derived much assistance from the judgment of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, which I have already described as an important decision. In that case, recognition was afforded by his Lordship to the

A move away from the technicalities of particular remedies and to the achievement of substantial justice. The relevant passage in the judgment of his Lordship is at p 489 of the report and it reads as follows:

> I would, however, in passing, and as a matter of general interest, remark that there are dicta in administrative law cases in the UK which indicate
B that judges there are beginning to depart from their traditional preference of dealing with the technicalities of remedies rather than the principles governing official action and individual rights. For example, in a recent immigration case *Bugdaycay* v *Secretary of State for the Home Department* [1987] 1 All ER 940, in the House of Lords, Lord Bridge stated that courts are entitled within limits:
>
> C 'to submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most
> D anxious scrutiny.'
>
> And Lord Templeman said this:
>
> 'Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.'

E In his statement of claim, the appellant has also prayed for 'further or other relief as this Honourable court thinks fit.' In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160, a prayer in a statement of claim read 'Any other relief which this Honourable court deems fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be
F treated as a mere ornament to pleadings devoid of any meaning'.

I am of the view that the same may be said of the like prayer in the present case. This court should, in my judgment, award the appellant such relief as is appropriate in the circumstances of the case.

In arriving at this conclusion, I have not overlooked the decision in
G *Mokhtar v Arumugam* [1959] MLJ 232 CA, where the following statement of principle from the judgment of Fry J in *Cargill v Bower* (1878) 10 Ch D 502 at p 508 was applied:

> You cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for.

H As it happens, there is, in the present case, no inconsistency between the relief which I propose to award to the appellant and the other relief he has expressly claimed. For that reason, I abstain from deciding this case upon my own view of the wider role which, I believe, courts should play in moulding relief to suit the justice of a particular case, especially in the field
I of public law.

That wider role has found expression in a number of Indian cases, including *Bhagat Ram v State of Himachal Pradesh* AIR 1983 SC 454, a

case concerning the removal of a public servant, where Desai and Misra JJ said (at p 460):

> The question is once we quash the order, is it open to us to give any direction which would not permit a fresh inquiry to be held ? After all what is the purpose of holding a fresh inquiry? Obviously, it must be to impose some penalty. It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of art 14 of the Constitution. Having been influenced by all these relevant considerations, we are of the opinion that no useful purpose would be served by a fresh inquiry. What option is open to us in exercise of our jurisdiction under art 136 to make an appropriate order. We believe that justice and fair play demand that we make an order of minor penalty here and now without being unduly technical apart jurisdiction, we are fortified in this view by the decision of this Court in *Hindustan Steels Ltd, Rourkela v A K Roy* (1970) 3 SCR 343: (AIR 1970 SC 1401) where this court after quashing the order of reinstatement proceeded to examine whether the party should be left to pursue further remedy. The other alternative was to remand the matter, that being a case of an industrial dispute, to the tribunal. It is possible that on such a remand this court further observed, that the tribunal may pass an appropriate order but that would mean prolonging the dispute which would hardly be fair or conducive to the interest of the parties. This court in such circumstances proceeded to make an appropriate order by awarding compensation. We may adopt the same approach. Keeping in view, the nature of misconduct, gravity of charge and no consequential loss, a penalty of witholding his increments with future effect will meet the ends of justice. Accordingly, two increments with future effect of the appellant be withheld and he must be paid 50% of the arrears from the date of termination till the date of reinstatement.

Conclusion

Having regard to all the circumstances of the case, the appellant ought not to have the declarations and these are accordingly refused. Instead, an order is hereby made reducing the appellant in rank in the manner and to the extent appearing in the Department's letter dated 10 April 1990, with effect from the date of his dismissal, namely, 7 May 1990. The appellant shall have paid to him all arrears of salary and other emoluments accruing to the reduced rank from that date until to-day.

The order of the learned judge is accordingly set aside and the appeal is allowed to the extent indicated above.

Since the appeal has succeeded on a point not taken in the court below, the appellant shall have only the costs of this appeal. The order of costs made by the High Court is affirmed. The deposit shall be refunded to the appellant.

Ahmad Fairuz J: I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA in draft and agree with the reasons and conclusions expressed therein.

NH Chan JCA (dissenting): It is necessary in this appeal to refer to the statement of claim which I reproduce in full below. This is what it says:

Statement Of Claim

1 The plaintiff is an individual and resides at No 6, Jalan Lebah, Taman Makmur, Batu Pahat, Johor.

2 The first defendant is a servant/agent of the second defendant.

3 On or about 1 July 1988 and on or about 10 December 1989, the plaintiff was charged with two counts of criminal breach of trust at the Sessions Court, Muar, Johor and as a result was interdicted from the public service.

4 At the material time, the plaintiff was the headmaster of Sekolah Rendah Jenis Kebangsaan Cina, Kangkar Baru, Yong Peng.

5 The plaintiff was convicted of both charges by the Sessions Court, Muar, Johor.

6 On or about 6 December 1989, the plaintiff appealed to the High Court of Muar. On or about 1 April 1990 the plaintiff's appeal was allowed. The conviction and sentence was set aside and the plaintiff was discharged conditionally upon his entering into a bond of RM5,000 without sureties, to be of good behaviour for a period of three years.

7 The plaintiff informed the Johor Education Department of the outcome of the appeal and wanted to report for duty.

8 The Johor Education Department informed the plaintiff that they would be awaiting the instructions of the first defendant.

9 On or about 10 April 1990 the Johor Education Department wrote to the first defendant requesting them to take disciplinary action and to reduce the plaintiff from the rank of the headmaster (category C2, tingkatan khas) to the rank of an ordinary teacher.

10 On 8 May 1990, the first defendant dismissed the plaintiff from the public service with effect from 7 May 1990.

11 By reasons of the matters aforesaid, the first defendant has wrongly, negligently and unlawfully dismissed the plaintiff from the public service on non-existent grounds and further wrongly misconstrued and/or misinterpreted the order given by the Honourable High Court of Muar on 1 April 1990 and General Order 4 (2)(d) [of the] Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980.

Particulars

The plaintiff's conviction and sentence was set aside on appeal by the High Court of Muar and the plaintiff was discharged conditionally. Therefore the plaintiff should not be subjected to any further action under art 135 (2)(a) of the Federal Constitution and also under General Orders Chapter 'D', rule 29.

12 Further or in the alternative the first defendant has infringed the rules of natural justice by dismissing the plaintiff.

Particulars Of Breach

(a) failing to give the plaintiff an opportunity to be heard in view of the fact that the first defendant, as a decision-maker, must afford such

an opportunity to a person whose interest will be adversely affected by the decision, as per the rule of *audi alteram partem.*

(b) failing to observe that the first defendant, as a decision-maker, must be disinterested or unbiased in the matter to be decided, as per the rule in *nemo debet esse judex in propria sua causa.*

13 By reasons of the matters aforesaid, the plaintiff has been put to loss and expense.

Wherefor the plaintiff prays for:

(a) a declaration that the dismissal of the plaintiff from the public service with effect from 7 May 1990 be declared null and void;

(b) an order that the plaintiff is still a member of the education service;

(c) an order that an account be taken of all salaries, emolution and other benefits lawfully due to him from the date of his interdictment;

(d) an order that the plaintiff be reinstated as a headmaster (category C2 tingkatan khas);

(e) interest;

(f) costs; and

(g) further or other relief as this Honourable court thinks fit.

Although paras 4 and 9 of the statement of claim describe the plaintiff as headmaster, that is wrong, as the plaintiff was only the senior assistant of the school; see the judgment of Abdul Malik Ishak J at first instance. This is what the judge said:

> The plaintiff was the senior assistant of Sekolah Rendah Jenis Kebangsaan (Cina) Tuan Poon, Simpang Rengam (see agreed bundle marked 'B' at p 4 and compare it with the agreed bundle marked 'A' at p 6 of para 4 of the statement of claim which described the plaintiff wrongly as the headmaster of Sekolah Rendah Jenis Kebangsaan Cina, Kangkar Baru, Yong Peng).

The thrust of the plaintiff's claim against the defendants is found in paras 11 and 12 of the statement of claim.

In para 11, the plaintiff says that as he has not been convicted of a criminal offence, there was no ground for his dismissal. This is because (according to the particulars) since the conviction and sentence against him (for the offence under s 409 of the Penal Code (FMS Cap 45)) had been set aside by the High Court at Muar, action to dismiss him should not have been taken against him without him being found convicted of a criminal offence. He claims that proviso (a) to art 135(2) of the Federal Constitution would not apply to his case.

In para 12 of the statement of claim, the plaintiff's claim is that his dismissal had been a breach of the rules of natural justice, in that, he was not given an opportunity to be heard in the procedure which led up to his dismissal.

In other words, the plaintiff by these two paragraphs in his statement of claim says that since his conviction and sentence for the offence under s 409 of the Penal Code (FMS Cap 45) had been set aside, he should not have been dismissed summarily without being given an opportunity of being heard (as proviso (a) to art 135(2) would not apply to his case).

A I shall start with art 132 (1)(h) of the Federal Constitution. It reads:

> 132(1) For the purposes of this Constitution, the public services are —
>
> ...
>
> (h) the education service.

B and art 135(2) with its proviso (a) which read:

> 135(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in
C rank on the ground of conduct in respect of which a criminal charge has been proved against him;

In the instant case, the plaintiff, who was in the education service, was dismissed 'on the ground of conduct in respect of which a criminal charge [had] been proved against him' in that he was charged with two counts of
D criminal breach of trust by the public servant under s 409 of the Penal Code (FMS Cap 45) and he was found guilty and convicted (it was not clear whether it was on both counts or on one count only) and sentenced to six months' imprisonment. On appeal, the High Court at Muar confirmed the finding of guilt but it set aside the imprisonment and instead bound
E over the plaintiff for three years under s 173(A)(ii)(b) of the Criminal Procedure Code (FMS Cap 6) without recording a conviction against him.

Art 135(2) will not apply to a case which comes within any proviso to the article. In the present case, proviso (a) applies to the plaintiff as he was dismissed 'on the ground of conduct in respect of which a criminal
F charge [had] been proved against him.' Therefore, the plaintiff's claim under para 12 of the statement of claim that his dismissal had infringed natural justice in that he was not afforded an opportunity to be heard must necessarily fail. The plaintiff did not have a right to be heard because proviso (a) to art 135 (2) applied to him in the circumstances of the instant case.

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The plaintiff's case for judicial review was based on art 135 (2) of the Constitution only; see paras 11 and 12 of the statement of claim. It was not founded on the basis that the penalty of dismissal was unwarranted in the present case and that a lesser penalty should have been imposed on him. That ground was never raised in his pleadings nor did he do so at the
H trial. In fact, that was not his case at all. I interpolate that at the trial only this was canvassed by both parties. This is how the trial judge put it; he said in his judgment:

> At the outset, both parties agreed that there was only one issue which would decide the whole case without having to call witnesses. That issue is this:
I whether the binding order made by the High Court, Muar, Johore under s 173A(ii)(b) of the CPC could be construed as a 'conviction' under paras 3, 33 and 35 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('GO') and, if the reply was in the positive, the dismissal was said to be perfectly legitimate and effected according to law.

The plaintiff's case for judicial review, according to his statement of claim, was based on art 135(2) of the Constitution. I would have thought that that was enough to dispose of the appeal. But my lord Gopal Sri Ram JCA (giving the decision of the majority) goes further. He considers that in the instant case dismissal was not the appropriate penalty as it was 'unduly severe in all the circumstances of the case.' Instead, he substitutes an order reducing the appellant in rank to that as appears in the letter of the department of 10 April 1990.

With respect to the majority decision in this appeal, I am unable to agree to the course taken by my lords which is to substitute their own views for that of the employers, as that would be applying the test of what they themselves (the court of tribunal itself) would have done and not the test of what a reasonable employer would have done. It is not for this court on an appeal, nor for any other court on the original hearing, to decide whether it would have dismissed on those facts. I think the correct test for this court on an appeal or for the High Court on the original hearing is to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. I gratefully adopt the words of Philips J in *NC Watling & Co Ltd v Richardson* [1978] ICR 1049 at pp 1056–1057:

> ... the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. It has to be recognized that there are circumstances where more than one course of action may be reasonable. In the case of redundancy, for example, and where selection of one or two employees to be dismissed for redundancy from a larger number is in issue, there may well be and often are cases where equally reasonable, fair, sensible and prudent employers would take different courses, one choosing A, another choosing B and another choosing C. In those circumstances for an industrial tribunal to say that it was unfair to select A for dismissal, rather than B or C, merely because had they been the employers that is what they would have done, is to apply the test of what the particular industrial tribunal itself would have done and not the test of what a reasonable employer would have done. It is in this sense that it is said that the test is whether what has been done is something which 'no reasonable management would have done.' In such cases, where more than course of action can be considered reasonable, if an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an employer will be found to have dismissed an employee unfairly although in the circumstances many perfectly good and fair employers would have done as that employer did.

In *Rolls-Royce Ltd v Walpole* [1980] IRLR 343, the principle as stated in *Watling*'s case was applied. Mr JD Hughes put it in this way, at p 346:

> As this appeal tribunal pointed out in the judgment in *Watling*'s case, in a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee. Frequently there is a range of responses to the conduct or capacity of an employee on the part of an employer, from and including summary dismissal downwards

A to a mere informal warning, which can be said to have been reasonable. It is precisely because this range of possible reasonable responses does exist in many cases that it has been laid down that it is neither for us on an appeal, nor for an industrial tribunal on the original hearing, to substitute our or its respective views for those of the particular employer concerned. It is in those cases where the employer does not satisfy the industrial tribunal that
B his response had been within that range of reasonable responses, that the industrial tribunal is enjoined by the statute to find that the dismissal of the relevant employee has been unfair.

In *British Leyland UK Ltd v Swift* [1981] IRLR 91, exactly the same principle as set out in *Watling* and applied in *Rolls-Royce* was reiterated by
C the English Court of Appeal. Lord Denning MR said, at p 93:

> The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: '... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate.' I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no
D reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.
E One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

Ackner LJ said at p 93:

F > As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.

G See also *Iceland Frozen Foods v Jones* [1983] ICR 17.

The test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for us to say. The correct test is: Was it reasonable for the employers to dismiss him? Or, put in
H another way: Might a reasonable employer reasonably have taken the view that the circumstances or gravity of the misconduct of the employee justified his dismissal? When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, for that matter, even the Industrial Court)
I must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned. At this moment, I think it is helpful to be reminded of the express words of General Order 35(1). It reads:

> Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department General Order 33 and 34(1), *the Appropriate Disciplinary Authority is of the opinion* that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly; *or if it is of the opinion* that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such a manner as it may deem fit. (Emphasis supplied)

Plainly, that must mean that the test to apply is the test of what a reasonable employer would have done and not the test of what the particular court or industrial tribunal itself would have done.

In my judgment, I think it was reasonable for the employers in the instant case to have reasonably taken the view ('*the Appropriate Disciplinary Authority is of the opinion*') that dismissal was the appropriate penalty ('that the officer merits dismissal'). The offence for which the appellant had been found guilty of was a grave one for which a reasonable employer might reasonably take the view that that in itself was gross misconduct and that it was quite reasonable to dismiss him. I think these words from Ackner LJ (*British Leyland UK Ltd v Swift* [1981] IRLR 91 at p 93) are opposite, and I wish to repeat them:

> As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.

I would dismiss the appeal.

Order accordingly.

Reported by KH Teo